IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-677

ARTHUR H. SCHWARTZ, individually and in his capacity as Chairman of the New York State Board of Elections, REMO J. ACITO, WILLIAM H. MCKEON, and DONALD RETTALIATA, individually and in their capacity as Commissioners of the NEW YORK STATE BOARD OF ELECTIONS,

Appellants,

—against—

ROY G. VANASCO and JOSEPH FERRIS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

ALAN H. LEVINE
THOMAS R. LITWACK
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

PAUL ASOFSKY
598 Madison Avenue
New York, New York 10022

Attorneys for Appellees

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MOTION TO AFFIRM

Appellees, Roy G. Vanasco and Joseph Ferris, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the grounds that the questions raised by the decision below are so insubstantial, and the decision below so plainly correct, as not to warrant further argument.

Statement of the Case

This is an appeal from the final judgment of a three-judge district court entered on July 14, 1975.

Section 472(a) of the New York Election Law directs and empowers the New York State Board of Elections (the "Board") to adopt a "fair campaign code" prohibiting "attacks based on racial, religious or ethnic background and deliberate misrepresentations of a candidate's qualifications, position on a political issue, party affiliation or party endorsement."

The Fair Campaign Code ("Code") subsequently promulgated by the Board, and codified in Title 9, Subtitle V, Part 6201, New York Codes, Rules, and Regulations (1974), prohibits, "during the course of any campaign

for nomination or election to public office or party position", by means of "literature, media advertisements or broadcasts, public speeches, press releases, writings or otherwise", "attacks on a candidate based on race, sex, religion or ethnic background" (section 6201.1(c)), any "misrepresentation of any candidate's qualifications including, but not limited to, the use of personal vilification... or scurrilous attacks... " (section 6201.1(d), any "misrepresentation of a candidate's position... " (section 6201.1(e)), and any "misrepresentation of any candidate's party affiliation or party endorsement... " (section 6201.1(f)).

The Board is empowered by the statute to conduct hearings and subpoena witnesses pursuant to complaints that the Code has been violated (sections 469(d) and 472(c)), to impose a fine of up to $1,000 upon any person found to have violated any provisions of the Code (section 472(d)), and to institute judicial proceedings to enforce the Board's decisions and orders (section 472(c)).

On October 23, 1974 the Board, after a hearing, rendered a decision upholding a complaint against campaign literature that described plaintiff Vanasco, then a candidate for election to the New York State Assembly, as a "Republican-Liberal". Al-

though the Board found that his use of the phrase "Republican-Liberal" "misrepresented his party endorsement" the Board made no finding that Mr. Vanasco's alleged misrepresentation was "deliberate".

On October 28, 1974, the Board served plaintiff Ferris, also a candidate for the state Assembly, with a Notice of Hearing advising him that he was the subject of a Fair Campaign Code complaint initiated by his opponent. The complaint focused primarily on a Ferris leaflet concerning certain campaign issues. The Notice ordered Mr. Ferris to appear at a hearing, pending which Ferris was requested to "cease the distribution of literature charged as a violation in the complaint until the complaint is heard and decided ...." Mr. Ferris complied with the Board's request.

On the day preceding Election Day, the Board rendered a decision finding that the leaflet violated the Code and that Ferris "utilized the language in the [leaflet] with actual knowledge of its falsity or with reckless disregard of its falsity".

The Board's decisions ordered Vanasco and Ferris to either surrender or remark all copies of their offending literature and agree to cease and desist the preparation, use, or distribution of any such lit-

erature. Both were warned that if they refused to abide by the Board's orders, the Board would seek a cease and desist order in the New York State Supreme Court. Vanasco was additionally threatened with a $1,000 fine for non-compliance. As to Ferris, the Board reserved "decision on a possible fine...." Both Vanasco and Ferris complied with the orders of the Board.

On July 14, 1975 a three-judge court for the Eastern District of New York held that section 472(a) of the New York Election Law and the related sections of the Code were unconstitutional on their face. It is from this judgment that the appellants have appealed.

ARGUMENT

The statutory and regulatory provisions struck down by the Court below so clearly prohibit protected speech, are so clearly and substantially vague and overbroad, and so clearly establish an unconstitutional system of prior restraints that plenary consideration by this Court is unwarranted.

The Statute's and the Code's prohibition of "attacks on a candidate based on race, sex, religion or ethnic background" violates the principle that debate on pub-

lic issues, including the qualifications of political candidates, should be "uninhibited, robust, and wide-open...." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). See also, Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). The district court upheld that principle in finding that New York's "attempt to eliminate an entire segment of protected speech from the arena of public debate is clearly unconstitutional." (9a)* Indeed, the appellants do not challenge the district court's holding in this respect.

The prohibitions against misrepresentations are also constitutionally deficient. The lower court's finding that they "cast a substantial chill on the expression of protected speech and are unconstitutionally overbroad on their face" (10a) is well supported by decisions of this Court. See, e.g., NAACP v. Button, 371 U.S. 415 (1963); Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974).

Appellants claim, however, that the lower court misinterpreted section 472(a). They argue that the statute, unlike the

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* The district court opinion is set forth in the Appendix to the Jurisdictional Statement.

Code, prohibits only "deliberate" misrepresentations and is, therefore, constitutional. New York Times Co. v. Sullivan. But the district court properly held that, in construing the statute, the court must look to the Code and how it has been construed by the Board. In that context, the court's finding that the statutory language is not so limited is clearly correct.

Even if the statute is read to require a showing of "actual malice", it is unconstitutionally vague and overbroad. What constitutes a candidate's "qualifications", "position on a political issue", or "party affiliation or party endorsement" -- and what constitutes a "misrepresentation"* thereof -- is not "susceptible of objective measurement", Cramp v. Board of Public Instruction, 368 U.S. 278, 286 (1961). Such terms are "plainly susceptible of sweeping and improper application." Keyishian v. Board of Regents of New York, 385 U.S. 589, 599 (1967). As the district court observed,

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* The district court noted that even "the word 'misrepresentation' is broader than 'falsehood' since it includes 'untrue, incorrect, or misleading' representations." (23a n. 18).

> "It is not hard to see, then, given the often difficult task of trying to define, for example, what a political candidate's 'position' is on issues discussed during a campaign, that the term 'misrepresentation' could be applied to almost all campaign speech." (13a)

The constitutional danger is heightened by the statute's failing to require that Board findings be based on "'clear and convincing' proof". (16a) New York Times Co. v. Sullivan, supra.

Apart from the vagueness of particular terms used in the statute, it is unconstitutional because it establishes a system of prior restraints upon speech* that is, for all relevent purposes, indistinguishable from the practices struck down by the Court in Bantam Books, Inc. v. Sullivan, 372 U.S. 58, (1963). Indeed the

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* Although the district court did not reach the issue of whether the Statute and Code authorized a system of prior restraints, that issue may be considered by this Court in determining whether or not to set this case for argument. Supreme Court Rule 16(1)(d).

New York Board of Elections, which may impose fines and issue formal orders against campaign literature, has even more extensive powers to restrain speech than did the Commission whose activities were considered in Bantam. Moreover, the Board's decisions are made "before an adequate determination that it is unprotected by the First Amendment". Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 390 (1973). As this Court has consistently held, Freedman v. Maryland, 380 U.S. 51 (1965); Southeastern Promotions Ltd. v. Conrad, 43 L.Ed. 2d 448 (1975), and as the court below recognized, "[j]udicial participation is particularly necessary when important First Amendment expression is involved." (16a) The requisite "procedural safeguards", Freedman v. Maryland, supra, 380 U.S. at 58, are wholly lacking in New York's scheme of restraint.

Finally the supposed evils the Statute and Code are allegedly designed to prevent are not "kindred to" the sorts of harm this Court has recognized as alone justifying the imposition of prior restraints. See New York Times Co. v. United States, 403 U.S. 713, 726-727 (1971) (opinion of Justice Brennan).

The effect on public debate of New York's statutory scheme for regulating campaign speech was aptly summarized by the court below:

> "The candidate who wishes to avoid the consequences of a Code proceeding -- including the adverse publicity such a proceeding would generate -- might very well be 'chilled' from the expression of protected First Amendment speech." (13a)

CONCLUSION

Appellant presents no substantial question for decision of this Court, and the decision below is so obviously correct as to warrant no further review. The judgment and decree of the district court should be summarily affirmed.

Respectfully submitted,

ALAN H. LEVINE
THOMAS R. LITWACK
MELVIN L. WULF
PAUL ASOFSKY

Attorneys for Appellees

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New York, New York